NO. 144

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

STATE BOARD OF INSURANCE, ET AL.,
Petitioners,

v.

TODD SHIPYARDS CORPORATION,
Respondent.

PETITIONERS' REPLY BRIFF

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PETITIONERS' REPLY BRIEF

This brief is filed pursuant to the provisions of Rule 40(4) of the Revised Rules of this Court, to clarify what petitioners believe to be errors in respondent's brief, to meet its argument on the merits, and to clarify the issues in this case. Wherever possible, reference to petitioners' briefs, heretofore filed in this Court, is made in an attempt to minimize reiterations of our contentions made therein or elsewhere appearing in the Transcript of Record in this cause.[1]

This reply brief, therefore, does not deal with petitioners' and respondent's conflicting views of the authorities cited in the briefs; to the extent they have not been

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[1] In addition to Petitioners' "Petition for a Writ of Certiorari to the Court of Civil Appeals," their "Answer to Respondent's Brief in Opposition to Petition for Certiorari," and the "Brief for the Petitioners," the Transcript of Record contains their "Application for Writ of Error" in the Supreme Court of Texas (Record, p. 243). Petitioners' contentions with respect to the principal cases are fully explored in

therein expounded, they will be clarified on oral argument.

Reply to Respondent's Statement of the Case

Respondent's opening shot is an excoriation of petitioners' failure "to correlate the facts with due process principles — 'taxable event', location of the 'taxable event', and the 'nexus' between the 'taxable event' and Texas." (Respondent's Brief, p. 1) Respondent cites no authority for these "principles," although they form the axis of its brief. It is petitioners' position that these principles are not those determinative of this case.

The "nexus" argument (Respondent's Brief, pp. 8-12) is merely a balancing of Texas' and New York's contacts with the overall transactions involved, a procedure irrelevant to this case. The issue is not whether New York or Texas is the more appropriate jurisdiction to tax or regulate this transaction; this is not a choice-of-law case. Respondent's equation of "nexus" and "minimal contact" (Respondent's Brief, p. 8) is inapposite and oversimplified. Respondent's reference (Respondent's Brief, p. 29) to the "dual Federal System" characterizes its fundamental misconception of the issues involved.

This Court is increasingly required to reconcile the competing claims of different states to tax or regulate aspects of commercial operations overlapping state lines. This is a necessary concomitant of a Federal system, and to attempt analysis of this case within the rubric of a "dual Federal System" is to beg the principal question. This aspect of Federalism extends beyond the fields of insurance and taxation and is perennially before the Court. See, e.g., *Western Union Telegraph Co. v. Pennsylvania*, 30 U.S.L. Week 4037 (U. S. Dec. 4, 1961). A brief review of several decisions of this Court with respect to other aspects of this problem as it has matured is appended to this brief. (See Appendix A, *infra*.)

Respondent displays a chameleonic ability in shifting from its due process argument (Respondent's Brief, p. 8) to its equal protection argument (Respondent's Brief, pp. 38-44;) in the former it admits that any equalization effect of the regulatory scheme as a whole is of no moment to it, since it is not an insurance company, while in the latter it adopts the mantle of an insurance company in decrying the alleged discrimination against unauthorized insurers.

Respondent's brief fails to distinguish the subject of the tax from its measure; the "five per cent of premiums paid" is merely the measure of a tax on the privilege of insuring Texas risks through unauthorized insurers.

Respondent's fixation with the "taxable event" (see, *inter alia*, Respondent's Brief, pp. 1, 2, 3, 8, 12, 18, 19, 31, 33, 36, 43.) reflects similar thinking along the lines of choice-of-law cases, although the jargon is borrowed from income tax cases; it provides no aid in analysis and disposition of this case.

Respondent relies (Respondent's Brief, p. 15) on the stipulation (Record, p. 46) that it has, since 1934, duly maintained its Texas permit to do business and has duly paid all taxes, fees, and charges levied against it for such permit and has duly paid all taxes, fees, and charges levied against it for the privilege of doing business in Texas, from which premise it concludes that "Petitioner (*sic*) does (*sic*) not attempt to justify this tax as a tax for the granted privilege of doing business." This statement simply ignores the obvious fact that this suit is one to recover a portion of such taxes.

Reply to Respondent's Due Process Argument

Respondent's argument (Respondent's Brief, pp. 26-28) that its business was developed in reliance on the decision in *Allgeyer v. Louisiana*, 165 U.S. 578 (1896), is

unsupported by the record, but, even if true, such reliance is scarcely catapulted to constitutional dignity by the decision in *Toolson v. New York Yankees, Inc.*, 346 U.S. 356 (1953), as even those portions of the opinion quoted in respondent's brief demonstrate.

Respondent's argument (Respondent's Brief, pp. 28-29) concerning multiple taxation is met primarily in the appendix to this brief; however, the possibility of multiple taxation in this case is unsupported by the record, hypothetical, and contrary to fact.

On page 29, respondent refers to Judge (*sic*) Holmes' "genius for condensation"; not only is its subsequent quotation from the *St. Louis Cotton Compress Co. v. Arkansas*, 260 U.S. 346 (1922), case out of context, it is also out of date (See Appendix A, infra); compare with the Justice's dissent in *Compania General De Tabacos De Filipinas v. Collector of Internal Revenue*, 275 U.S. 87 (1927). Respondent (Respondent's Brief, p. 30) again refers, without citation of authority, to "the conventional due process jurisdictional words of art, 'nexus, connection or minimal contact'"; as earlier indicated, petitioners do not regard these as controlling factors. *A fortiori*, petitioners regard such statements as "nexus must be based on existing 'taxable events'" (Respondent's Brief p. 33) as, at best, irrelevant. In this context, the opinions in *Compania (supra)*, upon which respondent heavily relies (Respondent's Brief, pp. 20-22), rather clearly refute the mechanical analysis urged by respondent.

The statement (Respondent's Brief, p. 34) that "some of the insurance is not available from Texas insurers" is not supported by the record.

The statement (Respondent's Brief, p. 35) that "Texas had absolutely no connection with the loss or its appraisal" is an obvious error, since the record reference (Record, p. 134) indicates that the damage was sustained

in consequence of the subject vessel's encountering heavy weather while in passage in tow of a tug from Houston, Texas, to Charleston, South Carolina.

The contentions raised by respondent's brief on other questions are adequately met in petitioners' briefs.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Copies of this Reply Brief have been served pursuant to Supreme Court Rule No. 33 by depositing five copies of the Brief in a United States Mail Box, with first class postage prepaid, addressed to each of counsel of record for the Respondent: Mr. Harry G. Hill, Cullen and Dykman, 177 Montague Street, Brooklyn, New York, and Messrs. Frank A. Liddell, and Charles R. Vickery, Jr., Liddell, Austin, Dawson & Sapp, 510 Gulf Building, Houston 2, Texas; and to counsel for Amici Curiae: Messrs. Cloyd Laporte and John Mason Harding, Dewey, Ballentine, Bushby, Palmer & Wood, 40 Wall Street, New York 5, New York.

Coleman Gay, III

APPENDIX A

The problem of state taxation or regulation of activities which cross state lines has been met by this Court on numerous occasions under analogous situations, and this Court's opinions in some of these cases are mentioned here as characterizing the Court's approach to these problems.

(1) MULTIPLE TAXATION

a. *Cream of Wheat Co. v. County of Grandforks*, 253 U.S. 325 (1920): "To this it is sufficient to say that the Fourteenth Amendment does not prohibit double taxation." (*id* at 330).

b. *Wheeling Steel Corp. v. Fox*, 298 U.S. 193 (1936): This case recognizes a permissible triple taxation under certain circumstances, with reference to so-called "unit rule" corporations.

c. *Minnesota v. Blasius*, 290 U.S. 1 (1933): This case permits state taxation of goods in interstate commerce and subject to Federal regulation.

(2) EXTRATERRITORIAL TAXATION

Empresa Siderurgica v. County of Merced, 337 U.S. 154 (1949): This case sustained a property tax on goods sold to a resident of a foreign country, which goods were located in the taxing state (California) on tax day.

(3) THE IMPORTANCE OF LABELS

a. The case of *Nebraska ex rel Beatrice Creamery Co. v. Marsh*, 282 U.S. 799 (1930), and the *Cream of Wheat* case (*supra*) provide an illuminating contrast, since in *Beatrice Creamery* the result in the state court (*sub nom. State ex rel Beatrice Creamery Co. v. Marsh*, 119 Neb. 197, 277 N. W. 926 (1929)) was reached in part by characterizing the challenged tax as a franchise tax. The

Court upheld a corporation tax on a domestic corporation measured by the entire value of its paid-up capital stock. (The *Beatrice Creamery Co.* case was dismissed in the United States Supreme Court for want of substantial federal question, *supra.*)

b. Brandeis, J. in the *Cream of Wheat* case (*supra*) expressed this Court's willingness to look beyond the state's labels:

> "The company concedes that the State of North Dakota might constitutionally have imposed a franchise tax upon a corporation organized under its laws, even though it had no property within the state. The contentions are that the supreme court of North Dakota erred in holding that the tax here in question was a franchise tax; that it was in reality a property tax upon intangible property; that the company's intangible property must be deemed to have been located where its tangible property was; and that in taxing property beyond its limits North Dakota violated rights guaranteed by the 14th Amendment. The view which we take of the matter renders it unnecessary to consider the question whether or not the law under discussion imposed a franchise tax or a property tax. Compare *Hamilton Mfg. Co. v. Massachusetts*, 6 Wall. 632 . . ." (Emphasis supplied.) *Id.* at 328)

c. In *Gregg Dyeing Co. v. Query*, 286 U.S. 472 (1932), Hughes, C. J., in an opinion of the Court, went further and viewed the taxing or regulatory scheme in its entirety:

> "In maintaining rights asserted under the Federal Constitution, the decision of this Court is not dependent upon the form of a taxing scheme, or upon the characterization of it by the state court. We regard the substance rather than the form, and the controlling test is found in the operation and effect of the statute as applied and enforced by the state. [Citations omitted.]
>
> " . . .

"The state court answered the contention as to discrimination against interstate commerce by referring to other statutes of the State imposing a tax upon the sale and use of gasoline within the State. The state court said that the Act in question 'taxes all gasoline stored for use and consumption upon which a like tax has not been paid under other statutes. By the kindred Acts all users are taxed.' But appellants question the right to invoke other statutes to support the validity of the Act assailed. To stand the test of constitutionality, they say, the Act must be constitutional 'within its four corners,' that is, considered by itself. This argument is without merit. The question of constitutional validity is not to be determined by artificial standards. What is required is that state action, whether through one agency or another, or through one enactment or more than one, shall be consistent with the restrictions of the Federal Constitution. There is no demand in that Constitution that the State shall put its requirements in any one statute. It may distribute them as it sees fit, if the result, taken in its totality, is within the State's constitutional power. . .

"Reading together the statutes with respect to gasoline taxes, the state court took the view that as to the gasoline tax with respect to sales within the State, the burden actually rests on the consumer, although not placed upon the consumer directly. No reason is found to challenge this view. . . . With respect, then, to the gasoline used by appellants in their business, there is in this aspect no discrimination against them because their gasoline has its origin in another state, as others either buying or producing gasoline within the state pay the tax at the same rate in relation to their consumption.

"Discrimination, like interstate commerce itself, is a practical conception. We must deal in this matter, as in others, with substantial distinctions and real injuries. [Citing cases.] . . . Appellants had the burden of showing an injurious discrimination against them because they bought their gasoline outside the state. This burden they have not sustained. They have failed to show that whatever distinction

there existed in form there was any substantial discrimination in fact. . . ." (Emphasis supplied.) (*id.* at 476-482)

(4) ESCHEAT CASES

The *Western Union* case, *supra*, together with its predecessors, *Standard Oil Co. v. New Jersey*, 341 U.S. 428 (1951), and *Connecticut Life Ins. Co. v. Moore*, 333 U.S. 541 (1948), represent perhaps this Court's most recent treatment of this type of problem.

INDEX OF AUTHORITIES